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IN THE

Supreme Court of the United States

October Term, 1968

No. 1156

CHECKER MOTORS CORPORATION,
Petitioner,

v.

CHRYSLER CORPORATION and
CHRYSLER MOTORS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS CHRYSLER CORPORATION AND CHRYSLER MOTORS CORPORATION

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Questions Presented

1. Should this Court review the exercise of discretion by the District Court denying a manufacturer a preliminary injunction to prevent a distributor from openly offering ultimate purchasers a uniform cash benefit?

2. Is a question of law presented under Section 1 of the Sherman Act that this Court should review on the denial of a preliminary injunction where there is absolutely no evidence that a distributor offering a valuable inducement to commercial consumers of its products (a) affected retail

prices in any way or (b) curtailed in any way the pricing freedom of its independent dealers and there is no irreparable injury or indeed any damage shown to have been caused thereby?

Counter-Statement of the Case

Petitioner Checker Motors Corporation seeks certiorari to the United States Court of Appeals for the Second Circuit as to its affirmance of that portion of the District Court's order denying petitioner's motion to enjoin preliminarily, but only in New York City, respondent Chrysler Motors Corporation's nationwide Commercial Fleet Value Program ("Program") on the sole ground that it is, on its face, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1.* While seeking preliminary relief under 15 U.S.C. §26, petitioner took no action whatsoever with respect to the Program—which was nationally publicized and in operation eight years since 1961—until March, 1964, three years after the Program's announcement, when petitioner filed its one-count complaint (PA 28-37)** which itself made no direct allegation or claim of a Sherman Act

* Although, on appeal, petitioner abandoned that portion of its preliminary motion which claimed that the Program violated the Robinson-Patman Act, it now gratuitously asserts in its Petition that Chrysler taxicabs and pleasure cars are "the same" (P 4) and that the taxicabs are "more costly", as to which the District Court found no supporting evidence (A 19-21).

** The numbers appearing after the following abbreviations indicate the pages of the citations described after each abbreviation: PA, Plaintiff-Appellant's Appendix in the United States Court of Appeals for the Second Circuit; DA, Defendants-Respondents' Appendix in the United States Court of Appeals for the Second Circuit; R, Record on Appeal to the United States Court of Appeals for the Second Circuit not reproduced in the Appendices; A, Appendix A to Petition for a Writ of Certiorari; B, Appendix B to Petition for a Writ of Certiorari; P, Petition for a Writ of Certiorari.

violation, as noted by the District Court (A 9). Indeed, it was not until April, 1967—six years after the Program's announcement—that petitioner suddenly and for the first time asserted that the Program, on its face, constituted a price fixing conspiracy from which it needed the "immediate" and drastic relief of a preliminary injunction. 15 U.S.C. §26. No final judgment has been entered and the case below is still in the discovery stage.

In short, petitioner now complains that certain commercial vehicles manufactured by its alleged competitor, respondent Chrysler Corporation, have been lowered by the Program since under it a cash inducement is offered to qualified commercial purchasers who buy Chrysler built commercial vehicles from independent dealers and that these dealers' pricing independence has been somehow curtailed. At bottom, the grievance presented is that retail purchasers are not paying enough, or at least not as much as petitioner would like. Indeed, it is obvious that petitioner really seeks to restrict competition.

However, even assuming the factual predicates (*i.e.*, lower prices and/or curtailment of the dealers' upward pricing ability) supposed by petitioner would present a question of law which this Court should review, the Courts below have not found a speck of evidence to support either predicate and, thus, there is no basis for any review.

As to the general pricing independence of dealers who purchase Chrysler products, the District Court found as follows:

> "Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers * * * [who] upon purchasing automobiles from it, as-

sumes the risk of loss and independently determines the retail price of automobiles purchased by it from Chrysler for sale." 283 F. Supp. at 879

As to evidence presented concerning the effect of the Program on the dealers and retail prices, the Court of Appeals quoted from the District Court's findings in relevant part as follows:

"On its face Chrysler's Rebate Plan does not curtail the dealer's pricing discretion. Each dealer is free (1) to raise retail taxicab prices, thus nullifying the effect of the rebate; (2) to keep his prices constant, and thus render Chrysler taxicab price competitive vis a vis General Motors, Ford, Checker and other automobile makers who grant similar rebates; or (3) to lower his prices still further in competition against both Chrysler and non-Chrysler dealers alike. No evidence has been offered to the effect that the $183 rebate has even the slightest tendency to restrict in any way the dealer's independent decision and determination as to the retail sales price quoted by him to customers for Chrysler taxicabs. The most that appears from the record before us is that the plan manifests to the taxicab purchaser a desire on Chrysler's part to promote competitive sale of its taxis, at least to the extent of giving the appearance of a price advantage to the customer in the form of a $183 rebate. Possibly the practice acts as a psychological inducement to the customer that cannot be realized through a direct price reduction to the dealer in the identical amount which would, as a practical matter, enable the dealer in his discretion to reduce his price accordingly. Certainly the marketplace is full of similar manufacturer-originated promotional sales 'gimmicks,' such as 'free goods' in the grocery and drug trades, coupons entitling the holder to cash or discounts, and the like, which do not run afoul of the Sherman Act in the ab-

sence of a showing of impropriety." 283 F. Supp. at 282-283

The Courts below also found that petitioner failed to demonstrate that either it (or competition*) had suffered any harm by virtue of the Program, thus, in effect, rendering moot this Court's review of the question, since Checker would in no event be entitled to a preliminary injunction. 15 U.S.C. §26 (A 11-13; B 8-9). Although the Program is admittedly nationwide, the Courts below found that petitioner's decline in sales have been localized in New York City and that the decline there is attributable to other factors and petitioner's own fault (A 11-13; B 8-9).

For example, petitioner has never faced up to the fact that the downturn in its taxicab sales in New York City was due in most part to the relinquishment under government impetus (see *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947)), beginning in the 1950's and continuing to the early 1960's, of 1,600 taxicab medallions formerly owned by its New York City operating subsidiary, National Transportation Company, Inc. These sales, which were made to various New York City taxi operators, were pre-conditioned on the operator's agreeing to buy his entire fleet from Checker for one or more years (PA 134-138; DA 5-7; R 1037, *et seq.*) and form the basis of part of respondents' counter-claim against the Checker "combine" in this action (PA 47, 48, 53). Thus, until these sales were consummated and until these "tie-in" agreements lapsed, petitioner had a captive market for taxicab sales, which ended in about 1964 and, not coincidentally, when its "sales" began to decline noticeable.

* To the contrary, the District Court found that the effect of the Program "appears to be to increase interbrand competition * * *" 283 F. Supp. at 886.

Faced with the loss of this captive and "tied-in" market, petitioner's chief-executive, Morris Markin, then began a campaign of intimidation and harassment directed against his former "customers" to brow-beat them into purchasing Checker's taxis. This campaign was hallmarked by public statements urging the New York City Hack Bureau to issue 2,000 more taxicab medallions (which depressed the price of those recently purchased from him by his potential customers) (PA 137, 138), urging a salary increase for his potential customers' employees (PA 144) and culminated in a statement to the *New York Daily News* on March 22, 1967 (PA 118) that his potential customers do not "deserve any [fare] increase * * * [and] challeng[ing] [them] to prove him a liar" (PA 118). The article further explains that Mr. Markin "enjoys the awe and resentment he inspires in local fleet owners" and quotes him as stating that when he is "through with them [he will] spit on their graves" (PA 118).

In sum, this Court is asked to review a case in its preliminary stages to determine whether a nationally advertised Program, found as a factual matter by the Courts below not to have any effect on retail prices or the selling independence of any merchant and further found not to have caused the petitioner any harm, is a *per se* price fixing conspiracy violative of 15 U.S.C. §1 entitling petitioner to a preliminary injunction under 15 U.S.C. §26. As the Court of Appeals put it, we are not "persuaded of either the likelihood of Checker's eventual success in this litigation or that the issues here raised are of sufficient magnitude and doubt to require the granting of a preliminary injunction" (B 9).

ARGUMENT

A

The decisions of the Courts below in refusing to enjoin preliminarily the Program as a *per se* price fixing violation of the Section 1 of the Sherman Act is in complete accord with the prior decisions of this Court especially in view of the District Court's findings that the Program in no way affected retail prices or the pricing freedom of any independent dealer.

To support its claim that the Program on its face constitutes a *per se* violation of the Sherman Act, petitioner must, as it concedes, make a factual demonstration, in the words of this Court, of the Program's alleged "pernicious effect on competition and lack of any redeeming virtue * * *" *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963); *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958). Petitioner contends that it has proved the Program to be "perniciously" anticompetitive by speculating —without the least proof—that the payments made under the Program indirectly reduce retail price levels—that is, that these payments result in lower prices to the consumer, one of the principal hallmarks of healthy competition! See *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 4; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940). However, suffice it to say that on this Petition petitioner is bound by the record and factual findings below which establish that there is no evidence that Program even has that effect (B 5-6).

Unable to show anything competitively wrong with the Program or that it has any actual effect on retail prices,

petitioner indulges in a scissors and paste-pot approach, piecing together a word here and there from many cases holding illegal horizontal arrangements designed to limit competition among competing sellers. However, they have no application to the individual conduct of a distributor who is doing nothing more than promoting the sale of its product without imposing anything on anyone else. Distributors and manufacturers in order to compete do many things to promote the sale of their products that are completely lawful. A cash incentive to consumers or ultimate purchases is surely one of them. Even if dealers or retailers take advantage of such promotional efforts there is no illegality, to say nothing of a *per se* Sherman Act violation. Indeed, unlike many horizontal price arrangements, programs between manufacturers and their distributors or retailers may be designed to, and actually, affect price without violating the Sherman Act because, among other reasons, of their stimulus to interbrand competition. For example, a manufacturer legally may suggest retail prices and his retailer may abide by them (*Susser* v. *Carvel Corp.*, 332 F. 2d 505, 510 (2d Cir.), *cert. granted*, 379 U.S. 835 (1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965)) and even go so far as affixing suggested prices on his products (*Plymouth Dealers' Ass'n* v. *United States*, 279 F. 2d 128, 134 (9th Cir. 1960); *Bailey's Bakery Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705, 722 (D. Hawaii 1954)); and in some circumstances the manufacturer may even allocate exclusive territories to its distributors (*White Motor Co.* v. *United States, above*, 372 U.S. at 261; *United States* v. *Schwinn*, 388 U.S. 365 (1967)). Here, respondents have not even tried to go this far and the decisions below completely conform to all of the prior decisions of this Court.

The fundamental fallacy in petitioner's position is shown by its attempt to characterize the Program, in contradiction to the facts of record, as "maximum price fixing" (P 14). But even this unsupported characterization raises no real question of law here. While holding vertical maximum price enforcement with the aid of a retailer illegal under the Sherman Act last term (see *Albrecht* v. *The Herald Company*, 390 U.S. 145 (1968), 36 U.S.L. Week 4171), this Court clearly pointed to the possible limited anticompetitive effects of such arrangements that are in no way applicable to the Program. As stated (36 U.S.L. Week at 4173):

> "Schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. * * * [1] Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. [2] Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition."

Thus, even assuming against the findings and record petitioner's assertion that retail prices have been lowered, petitioner must concede (and certainly has presented no evidence to the contrary) that the Program presents not the slightest resemblance to the furthest extension of the *per se* doctrine in a vertical context. To the contrary, last term this Court approved of and required a primary seller to give a cash rebate to retail customers of its wholesalers

in a Robinson-Patman Act proceeding. *F.T.C.* v. *Fred Meyer,* 36 U.S. L. Week 4233 (1968). It is respectfully suggested that this Court would hardly have reached such a result if it could be condemned as a *per se* violation of the Sherman Act!

B

Petitioner's "contract, combination and conspiracy" claim departs from its theory below and is without substance.

In its Petition, petitioner has chosen to argue extensively the merits of whether the Program meets the threshold requirement under the Sherman Act of being a "contract, combination or conspiracy" between two or more persons. However, since the Courts below expressly refused to pass unnecessarily on this aspect of Checker's claim on a motion for a preliminary injunction, there is, of course, nothing for this Court to consider reviewing.

It should be noted, however, that as to the claim that respondents conspired with each other (P 24), not only is there no evidence to support the claim, but since petitioner expressly abandoned this claim in the District Court (R 1670) and deprived respondents of an opportunity to adduce evidence addressed thereto, it ill behooves petitioner to raise it here. See, *e.g., Schwartz* v. *S.S. Nassau,* 345 F. 2d 465, 466 (2d Cir. 1965); *United States* v. *Vitasafe Corp.,* 352 F. 2d 62, 63 (2d Cir. 1965); *River Plate and Brazil Conferences* v. *Pressed Steel Car Company, Inc.,* 227 F. 2d 60, 63 (2d Cir. 1955).

As to the claimed vertical conspiracy between respondent Chrysler Motors Corporation and its dealers, a reading of the Program (D 1 et seq.) on whose face petitioner founds its conspiracy claim, and the District Court's finding that "Chrysler not only sets the amount of the rebate, but also unilaterally controls the terms and conditions under which it is granted, receives the completed forms and pays the rebate to the ultimate taxi purchaser" (283 F. Supp. at 888), keep this Program well within the legal "contractual boundaries of [the manufacturers] relationship with individual dealers." *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966); see also *Webster* v. *Packard Motor Co.*, 243 F. 2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957). Indeed, even if the dealers were to promote and advertise the Program to its extreme, without some evidence of collaboration between the dealers and respondent no inference arises of an illegal contract or conspiracy, since, in so promoting the Program, the dealers would be acting solely out of simple individual self-interest. See, e.g., *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951, 956 (2d Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co.*, 297 F. 2d 199, 206 (3rd Cir. 1961), *cert. denied*, 369 U.S. 839 (1962). What Petitioner must show in claiming an illegal vertical conspiracy, which admittedly it has not, is at least "* * * joint and collaborative action * * * pervasive in the initiation, execution and fulfillment of the plan * * * [that cannot] be described as 'unilateral' or merely 'parallel.'" *United States* v. *General Motors Corp.*, above at 145. Thus, there is no question of law raised that would be appropriate for review by this Court.

Conclusion

Petitioner has not advanced any justification for granting the writ and certiorari should be denied.

Respectfully submitted,

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